Before the
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In re	
DISTRIBUTION OF CABLE ROYALTY FUNDS	**CONSOLIDATED DOCKET NO. 14-CRB-0010-CD (2010-13)**

SETTLING DEVOTIONAL CLAIMANTS' RESPONSE TO PROGRAM SUPPLIERS' REQUEST FOR REHEARING OF THE INITIAL DETERMINATION OF ROYALTY ALLOCATION

Pursuant to the Judges' November 9, 2018 *Order Allowing Responses to Motion for Rehearing*, the Settling Devotional Claimants ("SDC") respond to each of the seven enumerated points identified in Program Suppliers' *Request for Rehearing of The Initial Determination of Royalty Allocation* ("Motion"). None of Program Suppliers' objections to the Judges' October 18, 2018 *Initial Determination* rises to the level of clear error or manifest injustice necessary to warrant rehearing. Therefore, the Judges should deny the Motion.

I. Standard for Rehearing

The Copyright Act confines the Judges' discretion to grant rehearing to "exceptional cases … on such matters as the Copyright Royalty Judges determine to be appropriate." 17 U.S.C. § 803(c)(2)(A); *see also* 37 C.F.R. § 353.1-2. In denying Program Suppliers' motion to rehear the initial determination in the distribution of 2004-2005 Cable Royalty Funds, the Judges explained that "exceptional cases require the movant to show that an aspect of the determination is erroneous, without evidentiary support, or contrary to legal requirements." *Order Denying Motions for Rehearing*, Docket No. 2007-3 CRB CD 2004-2005 (July 19, 2010), at 1 ("*2004-2005 Order*").

The Judges have emphasized that adherence to a "strict standard" is necessary "to dissuade repetitive arguments on issues that have already been fully considered by the [Judges]."

Order Denying Motions for Rehearing, Docket No. 2005-1 CRB DTRA (Apr. 16, 2007), at 1-2. Holding the bar for rehearing high, the Judges have adopted the standard for reconsideration of federal district court decisions under Federal Rule of Civil Procedure 59(e); that is, motions for rehearing "should be granted only where (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." *2004-2005 Order* at 1 (citing *Regency Communications v. Cleartel Communications, Inc*., 212 F. Supp.2d 1, 3 (D.D.C. 2002)).[1]

Program Suppliers do not assert that there has been an intervening change in controlling law or that new evidence is available. Therefore, each of Program Suppliers' contentions should be rejected unless Program Suppliers demonstrate "clear error" or "manifest injustice." To find "clear error," the Judges must find that an aspect of their *Initial Determination* was "unquestionably erroneous," Black's Law Dictionary (10th ed. 2014), or "arbitrary, capricious, whimsical, or manifestly unreasonable," *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1236 (10th Cir. 2001). Said slightly differently:

> To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.
>
> To be clearly erroneous, then, the [Judges'] decision must be dead wrong[.]

Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir.1988).

Similarly, "a manifest injustice does not result merely because a harm may go unremedied." *Mohammadi v. Islamic Republic of Iran*, 947 F.Supp.2d 48, 78 (D.D.C. 2013),

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[1] *See also Order Denying IPG Motion for Clarification and Reconsideration of Preliminary Hearing Order Relating to Claims Challenged by MPAA*, Docket No. 2008-2 CRB CD (2000-03) (Phase II) (May 23, 2013), at 2; *Order Denying Motion for Rehearing*, Docket No. 2006-1 CRB DSTRA (Jan. 8, 2008), at 1; *Order Denying SoundExchange's Motion to Reconsider the Board's Order Requiring, In Part, the Production of Certain Income Tax Returns*, Docket No. 2005-1 CRB DTRA (May 3, 2006) at 1.

(denying motion for reconsideration of siblings of prisoner who died after he was tortured in Iranian prison), *aff'd*, 782 F.3d 9 (D.C. Cir. 2015). Rather, "manifest injustice" requires "at least (1) a clear and certain prejudice to the moving party that (2) is fundamentally unfair in light of governing law." *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018) (citing *Mohammadi*, 947 F.Supp.2d at 78).

In response to motions by Program Suppliers and Canadian Claimants Group for rehearing in the 2004-2005 Cable Royalty Proceeding, the Judges concluded that their arguments "amount to nothing more than a recapitulation of arguments that the Judges fully considered in fashioning their Distribution Order. As such, the motions do not present the type of exceptional case that would warrant a rehearing or reconsideration." *2004-2005 Order* at 2. The same is true here.

II. Program Suppliers' Motion Falls Far Short of Demonstrating "Clear Error" or "Manifest Injustice."

Program Suppliers contend that it was "legal error" for the Judges to (1) adopt Dr. Crawford's fee-based regression analysis as a starting point for royalty allocations; (2) rely on Dr. Crawford's regression analysis when it could not be replicated perfectly; (3) determine each party's royalty awards as the Judges did; (4) apply an upward adjustment to the royalty awards for some claimants and not others; (5) allocate "Other Sports" shares to program categories other than Program Suppliers and Commercial Television Claimants ("CTV"); (6) exclude Program Suppliers' purported "Third Errata" to the testimony of Dr. Gray, filed on January 22, 2018;[2] and (7) consider changed circumstances evidence presented by other parties without addressing

[2] On this singular point, Program Suppliers also assert "manifest injustice." *Motion* at 2.

Program Suppliers' changed circumstance evidence regarding sports migration. Program Suppliers are wrong on each point.

First, Program Suppliers have not established it was clear error for the Judges to adopt Dr. Crawford's fee-based regression analysis as a starting point for royalty allocations, nor that such approach was a "clear departure from precedent." Motion at 4. The Judges undertook a detailed analysis of its precedent and the record in this proceeding, acknowledging the Register's admonition that "prior decisions are not cast in stone." *Initial Decision* at 11. In fact, even Program Suppliers conceded that the Judges "may change how they credit [a particular piece of] evidence when applying the [relative market value] criterion to the record before them" and even argued that "an approach or methodology for determining relative value adopted in a prior proceeding is not considered binding legal precedent." *Proposed Finding of Fact and Conclusions of Law of Program Suppliers* at 81. While recent decisions gave limited weight to fee-based regressions, Dr. Crawford's use of "the universe of all programs on all distant signals rather than a sampling," and "more variations and observations than past regressions" presented facts establishing that his model differed from ones previously considered. *See, e.g.*, *Initial Determination* at 37.

To be sure, both Program Suppliers and the SDC presented evidence challenging the underlying economic theory and implementation of Dr. Crawford's model. And the SDC maintain their view that Dr. Crawford's model was not a good one. But whether it was appropriate to use Dr. Crawford's methodology as a starting point for royalty allocations was a determination for the Judges to make based on the factual record in this proceeding. As the *Initial Determination* makes clear, the Judges addressed each of the parties' challenges to the Crawford regression at great length, rejecting some and giving weight to others. While the

Judges found that those challenges were not sufficient to cause them to reject Dr. Crawford's model, *see generally Initial Determination* at 13-37, the willingness of the Judges to credit other methodologies and testimony, in particular the Horowitz, Bortz and George studies, and testimony of industry professionals regarding the importance of niche programming, establishes that they relied on the large evidentiary record and engaged in reasoned decision-making within the bounds set by their legal precedent.

Second, it was not clear error for the Judges to use as a starting point a regression analysis that could not be replicated perfectly. It is true that Dr. Erdem found that Dr. Crawford's regression contained a deep flaw causing it to be sensitive to the order in which the data was presented, which should not have been the case. Dr. Gray, Program Suppliers' expert witness, also was unable to perfectly replicate Dr. Crawford's results, possibly for the same reason. Unfortunately, due to time constraints, Dr. Erdem was unable to identify precisely the cause of the problem or to propose a solution. CTV subsequently provided updated code files that corrected various issues in the data processing which, while not addressing the underlying flaw in the regression, at least enabled Dr. Erdem to produce results that were only "slightly different" from Dr. Crawford's. Ex. 5007, *Written Rebuttal Statement of Dr. Erkan Erdem* at 15.

The regression's unexplained sensitivity to data-sorting shows that there is still an uncorrected problem with the model, and undoubtedly made Dr. Crawford's results less reliable than they otherwise might have been. But, as has been noted many times (including by Program Suppliers themselves), every methodology will have flaws. *See, e.g.*, *Initial Determination* at 118; *Program Suppliers' Proposed Findings of Fact and Conclusions of Law* at 87 ("Viewing measurements are not perfect. . . ."); Tr.190:25-191:3 (Program Suppliers' opening statement) ("As a matter of fact, no single methodology in this proceeding is perfect…"). While

acknowledging this particular flaw, the Judges were within their discretion to discount the issue in the absence of evidence further quantifying the effect of the problem. What is more, it is relevant to note that Program Suppliers conceded "there is no basis to strike testimony under Section 351.10(e) when sufficient discovery has been produced to permit opposing parties to replicate and test the analyses presented." *Program Suppliers' Response to Proposed Findings of Fact and Proposed Conclusions of Law* at 24. Therefore, starting with the Crawford regression was not clear error.

With respect to Program Suppliers' ***third*** and ***fourth*** asserted reasons for rehearing (i.e., that the Judges did not adequately explain their bases for determining royalty share ranges, calculating shares, or applying adjustments), the D.C. Circuit has held repeatedly that an award by the Judges need not be based on perfect precision, and cannot be overturned if it is within a "zone of reasonableness." *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1304 (D.C. Cir. 1983) (citing *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 374 (D.C. Cir. 1982)). The Judges' determination meets that test. The Judges articulated a reasoned basis for the minimum to maximum ranges for each party's royalty award, pointing to evidence and testimony from (among others) Dr. Crawford, Mr. Horowitz, Mr. Trautman, Dr. George and Ms. McLaughlin. The Judges also stated their reasoned basis for the awards within those ranges. *Initial Determination* at 118-119. In short, it was both reasonable and consistent with statutory obligations and prior determinations for the Judges to rely predominantly on the results of methodologies presented by the parties that the Judges decided to credit, and to apply adjustments based on demonstrated flaws and more qualitative evidence, including the "niche" value of Devotional and Canadian programming. *See, e.g.*, *Distribution of the 2004 and 2005 Cable Royalty Funds*, Distribution Order, Docket No. 2007-3

CRB CD 2004-2005 (Phase I), 75 Fed. Reg. 57063, 57065, 57069-70 (Sept. 17, 2010); *Distribution of 1998-1999 Cable Royalty Funds*, Final Order, Docket No. 2001-8 CARP CD 98-99 (Phase I), 69 Fed. Reg. 3606, 3613 (Jan. 26, 2004).

Fifth, it was not clear error for the Judges to give no weight to the "Other Sports" category award, and to exclude it from the Horowitz survey results. Although the use of an "Other Sports" category was offered as an improvement by the Horowitz study over the similar Bortz study, there was (1) abundant evidence from many witnesses that Mr. Horowitz's implementation of the "Other Sports" category was seriously flawed,[3] and (2) a critical lack of evidence supporting Mr. Horowitz's allocation of all "Other Sports" value solely to Program Suppliers. *Initial Determination* at 73-74. As such, the Judges were well within their discretion to find that "Other Sports" was not a valid category, to exclude the "Other Sports" value from the Horowitz results, and to reallocate "Other Sports" points. *Initial Determination* at 79-80.

Sixth, it was neither clear error nor manifest injustice for the Judges to exclude Dr. Gray's last-minute methodological change, in which he substituted a voluminous amount of data and performed an all-new regression. As the SDC detailed in their *Motion to Strike MPAA's Purported "Errata" to the Testimony of Dr. Jeffrey S. Gray*, the Judges' precedents unquestionably establish that Program Suppliers' late attempt to revise its methodology—especially without first seeking leave to do so and without a showing of good cause—was inadmissible.[4]

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[3] The Judges carefully analyzed the "Other Sports" category, citing testimony from Mr. Trautman, Dr. Conrad, and Dr. Mathiowetz, to underscore that most "Other Sports" programs were not compensable, that the category was biased, and that it created value where none exists.

[4] *See Order Granting MPAA and SDC Motions to Strike IPG Amended Written Direct Statement and Denying SDC Motion for Entry of Distribution Order*, Docket Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase 2) (Oct. 7, 2016), at 4; *Final Distribution Order*, No. 2008-2 CRB CD 2000-03 (Phase II), 78 Fed. Reg.

Program Suppliers' late filing, submitted a mere *two weeks* before the February 5 scheduled start of the hearing, was all the more inexcusable given the amount of time that Program Suppliers were on actual notice of the issue. Program Suppliers' initially admitted that Dr. Gray discovered the omission of substantial data "in the course of preparing his December 29, 2017 Written Direct Testimony for the Distribution Phase of this Proceeding," which was bad enough. *Program Suppliers' Third Errata* at 1. But their underlying data showed that Program Suppliers' had known since no later than December 1, 2017, and Program Suppliers' experts ultimately revealed during the hearing that they learned about the WGNA omission the week after Thanksgiving. *See SDC Motion to Strike Purported Errata* (Jan. 25, 2018), MacLean Declaration at ¶ 7; Tr. 3518:10-22 (Lindstrom). In fact, Dr. Gray testified that he suspected a problem as early as "late summer of 2016." Tr. 4045:16-18; 4046:6-8 (Gray). Accordingly, because Program Suppliers sat on the problem for months (possibly more than one year) and failed to give advance notice to the other parties of their intended filing, consideration of the Third Errata would not have served "equity or efficiency" even if Program Suppliers had properly sought leave to file. *See Order on IPG Motion for Leave to File Amended Written Direct Statement*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) (Jan. 10, 2017) at 4.

Program Suppliers' claim that they have suffered disparate treatment because all other parties were allowed to make corrections is inaccurate. All parties—including Program Suppliers—made minor corrections that nobody opposed, but the SDC were the only other

64,984, 65,004 (Oct. 30, 2013), vacated on other grounds, *SDC v. Copyright Royalty Board*, 797 F.3d 1106 (D.C. Cir. 2015).

participant to seek leave to submit a more substantive change. *SDC Motion for Leave to Supplement Written Rebuttal Testimony of Dr. Erdem* (Oct. 13, 2017). Leave to file that proposed change—which was not nearly so last-minute or drastic as Program Suppliers' change—was also denied, a ruling within the Judges' discretion. *Order Denying SDC Motion for Leave to Supplement Written Rebuttal Testimony of Dr. Erdem* (Feb. 8, 2018).

It is also inaccurate to say that all parties had sufficient opportunity to respond to Program Suppliers' Third Errata. At least two parties' expert witnesses testified that they had insufficient time to respond, and it was not clear error or manifest injustice for the Judges to credit that testimony. *See Amended Rebuttal Testimony of Erkan Erdem, Ph.D.* (Feb. 9, 2018), at 9 ("I could have performed additional investigations and tests to offer other insights, but it would have required more time."); *Amendment to Written Rebuttal Testimony of Matthew Shum, Ph.D.* (Feb. 9, 2018), at 2 ("I have not had sufficient time to prepare a full response to Dr. Gray's January 22, 2018 Testimony . . . ."). At any rate, Dr. Gray's erroneous data was not the only reason why the Judges did not credit Program Suppliers' viewership-hours methodology, which was both unsound in theory and seriously flawed in application. *See, e.g.*, *Initial Determination* at 97 ("It is clear to the Judges that relative levels of viewership do not adequately explain the premium that certain types of programming can demand in the marketplace. … [V]iewership, without additional evidence to account for the premium that certain categories of programming fetch in an open market, is not an adequate basis for apportioning relative value among disparate program categories."). There is no reason to believe there would have been a different result even if Dr. Gray's Third Errata had been allowed.

Seventh, the Judges did not fail to consider or address Program Suppliers' evidence regarding sports migration. Indeed, the Judges specifically identified and discussed the issue and

cited to the testimony of Program Suppliers witness Ms. Sue Ann Hamilton. *See Initial Determination* at 72 ("Ms. Hamilton further opined … that migration of live team sports programming to regional cable networks further complicates the equation."). Hence, this issue was not ignored. Further, if one believes that the methodologies the Judges considered reflect value, then it follows that any effect of sports migration is already captured in the methodological results.

In any event, the Judges were not obligated to assign a specific value to every single evidentiary point made in the course of a five-week hearing. "[I]t is solely within the purview of the Judges to determine what weight, if any to accord to any evidence," and Program Suppliers' "disagreement with the Judges' evidentiary discretion is not an indication of either clear error or manifest injustice." *Order Denying Johnson Motion for Rehearing*, Docket No. 16-CRB-003-PR (2018-2022) (June 6, 2018), at 5.

III. Conclusion

The SDC request that the Judges deny Program Suppliers' *Request for Rehearing of the Initial Determination of Royalty Allocation.*

Respectfully submitted,

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